Supreme Court, U.S.
FILED
APR 17 2000
OFFICE OF THE CLERK

No. 992021

IN THE

SUPREME COURT OF THE UNITED STATES

BART KOSKO, Ph.D.,

Petitioner,

vs.

JUDGE THOMAS ASHWORTH, III and JUDGE JANIS L. SAMMARTINO,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a judge loses immunity if he disqualifies himself from a court proceeding for conflict of interest and then later reinserts himself into that proceeding to alter its outcome—whether the Ninth Circuit's ruling voided the jurisdictional immunity-piercing prong of *Mireles v. Waco*, 502 U.S. 9 (1991).

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PETITION FOR WRIT OF CERTIORARI

Bart Kosko, Ph.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. The Order of the United States District Court for the Southern District of California granting Defendants' Motion to Dismiss with Prejudice is also unreported.[1]

JURISDICTION

The United States Court of Appeals issued its Memorandum Opinion on August 13, 1999. The Ninth Circuit's Order denying rehearing was entered on January 18, 2000. The jurisdiction of this court is invoked under 28 U.S.C. section 1254.

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[1] The Memorandum Opinion of the United States Court of Appeal for the Ninth Circuit is set forth in Appendix A. The Order of the district court granting Defendants' Motion to Dismiss with Prejudice is set forth in Appendix B. The Order denying Petitioner's Petition for Rehearing is set forth in Appendix C. A letter from the State of California Commission on Judicial Performance is set forth in Appendix D.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's district court lawsuit stated causes of action for violation of 42 U.S.C. sections 1983 and 1985, subdivision (2). 42 U.S.C. section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Subdivision (2) of 42 U.S.C. section 1985 reads in pertinent part as follows:

Obstructing justice; intimidating party, witness, or juror;

. . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

. . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

SUMMARY

This writ asks the court to review a fundamental question of law that remains unanswered and as such casts a shadow of uncertainty over the very legitimacy of the judiciary: Does a disqualified judge lose immunity from the case from which he has disqualified himself?

The original complaint in San Diego District Court alleged that a state family-law judge interfered with a child-custody case after he had disqualified

himself from that case for conflict of interest. The California Commission on Judicial Performance investigated the matter and sanctioned this judge and the presiding judge in the family court. But the district court dismissed the complaint on grounds of judicial immunity despite the Ninth Circuit's clear language in *Gregory v. Thompson*, 500 F.2d 59, 62 fn. 2 (9th Cir. 1974): "Examples of acts 'in the clear absence' of jurisdiction include a judge's interference with judicial proceedings after he had disqualified himself from acting therein." The Ninth Circuit's unpublished ruling on the appeal contradicts this language.

This writ presents four major reasons for review. The first and core reason for review is that the Ninth Circuit's ruling is confused and voids the second or jurisdictional prong of this court's decision in *Mireles v. Waco*, 502 U.S. (1991). This prong holds that a judge loses immunity if he acts in the absence of jurisdiction: "Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. at 11 - 12 (1991). The Ninth Circuit's ruling implies that there are no exceptions to immunity for acts of a judicial nature carried out in the complete absence of jurisdiction. The one-paragraph ruling is confused because it plainly misreads the cases it cites, presents no reasoning for its assertions, and even seems to uphold and void one of its prior decisions (*Gregory*) at the same time.

The second reason for review is that the district court also voided the second prong of *Mireles*. Its ruling created a logically impossible hurdle because it held that

a judge loses immunity if he acts nonjudicially *and* acts judicially at the same time. The Ninth Circuit ratified this logical error. Such logical contortions illustrate the cloud of uncertainty that the courts face on the question whether disqualification removes jurisdiction and hence removes immunity.

The third reason for review is that the Ninth Circuit's short unpublished ruling contains stark errors: It contradicts its prior language on the disqualification exception to immunity and it plainly misreads the immunity cases it cites. The ruling cites *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996) and *Stump v. Sparkman*, 435 U.S. 349 (1978) on the core and recurring point of jurisdiction. But these cases involve sitting judges and not disqualified ones. The Ninth Circuit's ruling also flatly contradicts its own language and reasoning in *Gregory*: "We reject Kosko's assertion that the judges acted in a clear absence of jurisdiction under *Gregory v. Thompson.*" But *Gregory* plainly states that a judge acts in the clear absence of jurisdiction in just this case of acting on a matter after he has disqualified himself from it.

The fourth reason for review is that eliminating the disqualification exception to immunity undermines the judiciary. Granting review would settle questions of fundamental importance to both the theory and practice of law. Does disqualification remove immunity? Is there really a functioning second prong in *Mireles*? And just what benefits would accrue if this court allows disqualified judges to interfere with such cases when the possible harm is so obvious? Reversing the Ninth

Circuit's ruling would not create a slippery slope that might undermine judicial immunity because disqualification draws a sharp line of demarcation. It is just the kind of well-defined and carefully drawn distinction that strengthens and legitimizes the cloak of immunity. The disqualification exception to immunity raises fundamental questions about the role of the judiciary and the very sovereignty of states. But lack of review of this important concept has cast a cloud of uncertainty over the immunity foundations of the judiciary. The sheer gravity of this issue calls for this court to grant review with summary reversal an appropriate disposition.

STATEMENT OF FACTS

1. **Defendant Judge Ashworth had a personal and professional conflict of interest in petitioner's family-law case**. Judge Janis Sammartino presided over the San Diego Family Court in August of 1997. She granted petitioner a temporary change of custody order on 7 August 1997. Petitioner had sought to bring his ten-year-old daughter to Los Angeles (where petitioner is a professor of electrical engineering at the University of Southern California) from Tijuana, Mexico (where the child's mother had taken her from San Diego). Petitioner's ex-wife retained an attorney who a week later called an *ex parte* hearing and asked the court to reverse this custody order. The *ex parte* hearing went before Judge Thomas Ashworth III because both the assigned judge and Judge Sammartino were not available.

Judge Ashworth not only chose to hear the case but ruled against petitioner: he granted the motion reversing Judge Sammartino's custody order to remove the child from Tijuana. Judge Ashworth made this ruling even though his son had worked on petitioner's divorce case in 1988 as a summer clerk for his former law partner and even though Judge Ashworth knew both that petitioner had fired his former partner (who acts as trustee for part of Judge Ashworth's family trust) and that petitioner had later reached a private settlement with his former partners. Petitioner was in Los Angeles during this *ex parte* hearing. Petitioner's family-law attorney did not know of his client's prior conflict of interest with Judge Ashworth.

2. **Defendant Judge Ashworth disqualified himself in writing from petitioner's case.** The next day petitioner's attorney appeared before Judge Ashworth in a second *ex parte* hearing and demanded that Judge Ashworth both vacate his order from the day before and disqualify himself from the case. Judge Ashworth did so in writing. He cited "conflict of interest" as his reason. Judge Ashworth transferred the matter to Judges Domnitz and Kutzner of the family court. Both judges ruled in favor of petitioner and upheld Judge Sammartino's custody order of August 7th.

3. **Defendant Judge Ashworth reinserted himself into petitioner's case and changed its outcome.** Officers from the San Diego District Attorney's Child Abduction Unit detained petitioner's ex-wife on 2 September 1997 when she appeared at a mandatory child mediation session at family court without petitioner's daughter.

Petitioner's ex-wife had until then refused to comply with Judge Sammartino's standing court order of 7 August 1997 that she retrieve petitioner's daughter from Tijuana and surrender her to petitioner in Los Angeles. The officers asked Judge Sammartino to reaffirm her ruling and she did so. Petitioner's ex-wife complied with the court order rather than face immediate arrest.

But just two days later Judge Sammartino's office called petitioner's attorney in the afternoon and asked that he notify opposing counsel to appear early the next morning for a special *ex parte* hearing in Judge Sammartino's chambers. Both attorneys appeared as ordered on the morning of 5 September 1997. Judge Sammartino said she had reconsidered her order and now reversed it. She then ordered that the child must return to Tijuana. Petitioner's attorney asked Judge Sammartino how she had reached such a conclusion. She admitted before both counsel that she had discussed the case with disqualified Judge Ashworth in the interim and that he had persuaded her. Petitioner's attorney reminded her that Judge Ashworth had disqualified himself from the case and that she had a copy of his disqualification in front of her. Judge Sammartino admitted that she knew this.

Presiding Judge Sammartino at once agreed to petitioner's attorney's demand to vacate the new order and disqualify herself from the case. She then transferred the matter to Judge Cannon of the family court. He too ruled in favor of petitioner and upheld Judge Sammartino's original custody order of August 7th.

4. **The California Commission on Judicial Performance investigated both judges and sanctioned them.** Petitioner filed a complaint against defendant Judges Ashworth and Sammartino on 7 November 1997 with the California Commission on Judicial Performance. The Commission fully investigated the complaint. The Commission sent petitioner a letter on 17 June 1998 that confirmed that it had investigated the complaint and that stated that it had "taken an appropriate corrective action." (See Appendix D.)

5. **The district court dismissed petitioner's civil-rights complaint on the grounds of judicial immunity.** Petitioner filed on 3 September 1998 a civil-rights action against Judges Ashworth and Sammartino under 42 U.S.C. sections 1983 and 1985(2). The action was filed in the United States District Court for the Southern District of California invoking that court's general federal question jurisdiction pursuant to 28 U.S.C. section 1331. The complaint alleged that the defendant judges had conspired to obstruct justice and to violate petitioner's constitutional right to due process. The defendant judges filed on 23 September 1998 a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) on the grounds of judicial immunity. The district court entered on 9 November 1998 its Order Granting Defendants Motion to Dismiss with Prejudice. (See Appendix B.)

6. **The Ninth Circuit affirmed the district court's ruling.** Petitioner appealed the district-court's ruling to the United States Court of Appeals for the Ninth Circuit.

The appeal asked the Ninth Circuit to reverse the district court's dismissal based on the disqualification exception to immunity in the Ninth Circuit's own ruling in *Gregory v. Thompson*, 500 F.2d 59, 62 fn. 2 (9th Cir. 1974). A three-judge panel issued an unpublished one-paragraph ruling on 13 August 1999 that did not mention disqualification. (See Appendix A). The ruling affirmed the district-court's dismissal.

7. **The Ninth Circuit refused to grant a rehearing.** Petitioner filed a petition for rehearing and petition for rehearing *en banc*. The Ninth Circuit issued a ruling on 18 January 2000 that denied both. (See Appendix C).

REASONS FOR REVIEW

I.

THE NINTH CIRCUIT'S RULING IS CONFUSED AND PLAINLY VOIDS THE JURISDICTIONAL PRONG OF THE SUPREME COURT'S DECISION IN *MIRELES V. WACO*

This court has confirmed that a judge loses judicial immunity either if he acts in a nonjudicial way or if he acts in a judicial way but in the absence of jurisdiction: "[O]ur cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. (citations omitted). Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v.*

Waco, 502 U.S. at 11 - 12 (1991). These two cases are the two well-known "prongs" that can pierce judicial immunity.

Petitioner's appeal to the Ninth Circuit asked a central question about triggering the second or jurisdictional prong of *Mireles*: *If a judge disqualifies himself from a case (for conflict of interest) and later interferes with the case, then has he divested himself of all jurisdiction and thus of immunity?* What would be the point of disqualification if the judge still maintained jurisdiction over a case after he disqualified himself from it? Jurisdiction is just what disqualification removes. Indeed if disqualification does not satisfy the second prong of *Mireles*, then what does?

The Ninth Circuit has explicitly addressed the disqualification exception to immunity. It has clearly stated that disqualification pierces immunity. Indeed the Ninth Circuit not only stated that disqualification removes jurisdiction and hence removes immunity but it even called out this well-defined circumstance as a concrete example of what would trigger the jurisdictional prong: "Examples of acts 'in the clear absence' of jurisdiction include a judge's interference with judicial proceedings after he had disqualified himself from acting therein," *Gregory v. Thompson*, 500 F.2d 59, 62 fn. 2 (9th Cir. 1974). This language is fully consistent with this court's reasoning in *Mireles*.

Yet the Ninth Circuit issued a confused and even careless ruling in petitioner's appeal. The Ninth Circuit now denies that self-disqualification pierces immunity

(as we argue more fully below). The one-paragraph ruling plainly misreads the cases it cites (as we also argue more fully below). It simply presents no reasoning for its assertions. And it even seems to uphold and void one of its prior decisions (*Gregory*) at the same time. The Ninth Circuit's ruling raises a disturbing question about the limits of judicial immunity: Is there really any exception for acts of a judicial nature carried out in the complete absence of jurisdiction? Do such acts exist?

This court plainly believed that acts of the second type exist. Else the second prong of *Mireles* is vacuous and thus not a prong at all. So the question arises: What are examples of acts judicial in nature that take place in the complete absence of jurisdiction? Again the Ninth Circuit in *Gregory* said that such an example is a judge's interference after disqualification. So disqualification satisfies the second prong of *Mireles*. Indeed the very point of *Gregory* is the quite reasonable one that if anything clearly counts as a judicial-like act taken without jurisdiction, then it is a judge's interference in a case after he has disqualified himself from it.

But if the Ninth Circuit says that this action does not satisfy the second prong, then what does? If the Ninth Circuit says that nothing does, then the Ninth Circuit has voided and overruled this part of *Mireles*. Does the second prong of *Mireles* still hold in the Ninth Circuit? Does it hold anywhere? And what benefits would accrue to allowing a disqualified judge to interfere with such cases when the possible harm is so obvious? Is the purpose of immunity to protect judges

who deliberately interfere with court proceedings when they have such an admitted conflict of interest that they formally disqualify themselves from those proceedings? Are such disqualified judges above the law? Granting review would dispel the uncertainty that these questions raise about the limits of immunity and hence about the very legitimacy of the judiciary.

II.
THE DISTRICT COURT ALSO VOIDED THE SECOND PRONG OF *MIRELES*: ITS RULING CREATED A LOGICALLY IMPOSSIBLE HURDLE--A JUDGE LOSES IMMUNITY IF HE ACTS NONJUDICIALLY AND ACTS JUDICIALLY—AND THE NINTH CIRCUIT RATIFIED THIS LOGICAL ERROR

The district court committed a basic logical error in its reading of *Mireles*: It read the two immunity-piercing prongs as holding jointly rather than singly. So the district court erroneously believed that a complainant needs to satisfy both prongs to pierce immunity—despite the clear language of *Mireles* that says he needs to satisfy only one of the two prongs. (Logicians would here distinguish a disjunction read as a conjunction or an 'or' read as an 'and.') That set up an impossible hurdle to pierce immunity that no possible circumstances could overcome.

Mireles gives two "prongs" or conditions that can strip immunity from a judge. The language of *Mireles* plainly shows that either prong triggers this loss of immunity: "Our cases make clear that the immunity is

overcome in only two sets of circumstances," *Mireles*, *supra*, 502 U.S. at 11- 12. So the logical relation between the two prongs is that of 'or' and not 'and.'

The logical relation between the two prongs cannot be joint or 'and' because that would create a logical contradiction. For the first prong explicitly calls out "nonjudicial acts." The second prong implicitly calls out *judicial* acts but restricts them to those acts where the judge lacks all jurisdiction: "Second, a judge is not immune for actions, **though judicial in nature**, taken in the complete absence of all jurisdiction," *Mireles*, *supra*, 502 U.S. at 11 - 12 (emphasis added). So the 'and' connective would create a logically impossible set of conditions. Then a judge would lose immunity if and only he acted non-judicially (such as if he shot someone while he walked to his office) *and* he still somehow acted judicially (but how?). No action is both judicial and non-judicial. So any reading of *Mireles* that sees the two prongs as only jointly sufficient (or jointly necessary) to strip immunity is plainly wrong. Yet that is just how the district court read *Mireles*.

The district court argued that petitioner's complaint could overcome immunity only if the conduct he challenged was nonjudicial in nature:

> The relevant inquiry before this court is the nature and function of the act, rather than the act itself. *Mireles*, 502, U.S. at 13. "In other words, we look to the particular act's relation to the general function normally performed by a judge."

> *Id.* Here, the acts of judges conferring and discussing points of law, particular facts, or exchanging other communications is an inherent judicial function and one that is specifically provided for in the Code of Judicial Ethics. California Code of Judicial Ethics Canon 3(B)(7)(b) (1996) ("A judge may consult...with other judges" outside the presence of the parties). Because such judicial acts often go to the core of the proper administration of justice and are intimately involved with the judicial deliberative process, judicial immunity applies to protect this function. The court's focus is not on Plaintiff's allegations of a conspiracy to deprive him of constitutional rights, but on the nature of the judicial function at issue. (Judge Jeffrey T. Miller, Order Granting Defendants' Motion to Dismiss with Prejudice, 11 November 1998.) (See Appendix B.)

Of course the action was judicial in nature since the very point in dispute was whether the judge had jurisdiction when he acted in a judicial matter after he had disqualified himself from it. A judge has jurisdiction only over his judicial acts. Thus the district court quite easily reached the conclusion that the acts in question were judicial acts—the canons of judicial conduct even called them out as such—and therefore petitioner could not pierce immunity under the first

prong. The logical error came in the next step when the district court took this as sufficient grounds for dismissing the *Mireles*-based immunity challenge altogether.

The Ninth Circuit confirmed this fallacious reasoning when it affirmed the district court's ruling. Indeed the Ninth Circuit's short unpublished ruling did not even address the issue of the district court's obvious logical error despite a full discussion of it in the Appellant's Opening Brief. The Ninth Circuit further supported this fallacious reasoning when (as we show next) it refused to use its own language in *Gregory* to trigger a jurisdictional-prong challenge to immunity. These logical contortions illustrate the cloud of uncertainty that the courts face on the question whether disqualification removes jurisdiction and hence removes immunity. Only granting review can disperse this cloud.

III.
THE NINTH CIRCUIT'S RULING CONTAINS STARK ERRORS: IT MISREADS *MOORE V. BREWSTER* AND *STUMP V. SPARKMAN*

The Ninth Circuit's short unpublished ruling contains stark errors: It contradicts its prior language on the disqualification exception to immunity and it plainly misreads the immunity cases it cites. The previous sections showed that the ruling both voids the jurisdictional prong of *Mireles* and ratified the simple logical error in the district court's ruling that read the logical 'or' between the two *Mireles* prongs as an 'and'

and thus raised a barrier to immunity challenges that would be logically impossible to surmount.

Consider first how the Ninth Circuit dealt with its prior reasoning on the disqualification exception to immunity. The appeal presented the Ninth Circuit a textbook illustration of this principle of law in *Gregory*. The original complaint alleged that defendant Judge Ashworth plainly interfered with judicial proceedings after he had disqualified himself from doing so. No one disputes that he disqualified himself from the case.

Yet the Ninth Circuit's ruling flatly contradicted *Gregory*: "We reject Kosko's assertion that the judges acted in a clear absence of jurisdiction under *Gregory v. Thompson*, 500 F.2d, 59, 62 no.2 (9th Cir. 1974). See *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996)." (13 August 1999 ruling, p. 2). This language is impossible to reconcile with *Gregory* because *Gregory* plainly states that a judge acts in the clear absence of jurisdiction in just this case of acting on a matter after he has disqualified himself from it. Citing *Moore* or any other case does not remove this contradiction. And *Moore* does not restore immunity to a judge who has already lost it.

The Ninth Circuit's ruling hacked a strawman because it confirmed a point that was not at issue: Immunity protects judges from allegations of mistake and malfeasance while they sit on the bench. For instance, *Moore v. Brewster*, 96 F.3d 1240, 1243 - 1244 (9th Cir. 1996) holds that "Nor is judicial immunity lost by allegations that a judge conspired with one party to

rule against another party: 'a conspiracy between judge and [a party] to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges....' *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (*en banc*)."

The ruling casts the central issue as this judicial conspiracy and nowhere mentions disqualification: "these allegations involve acts committed by the state judges within the scope of their judicial duties and the judges did not act in an absence of authority. See *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)." (Appendix A).

But this statement does not apply to Judge Ashworth because he had disqualified himself from the case for conflict of interest. So he had already lost his jurisdiction and hence lost his immunity. And again nothing in *Moore* restores immunity to a judge who has already lost it.

Indeed the language of this court's decision in *Stump* confirms and clarifies this point rather than refutes it: "The necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. The scope of a judge's jurisdiction must be construed broadly where the issue is the judge's immunity from suit; a judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of

jurisdiction," *Stump v. Sparkman*, 435 U.S. 349; 98 S. Ct. 1099 (1978). Mistake or malfeasance alone will not remove a judge's immunity. But we do not allege that error, malice, or excess of authority removed Judge Ashworth's immunity. Rather he relinquished it himself when he declared that he could not properly hear the case because of conflict of interest. The Ninth Circuit's clear confusion over this matter further shows the need to grant review.

IV.
ELIMINATING THE DISQUALIFICATION EXCEPTION TO IMMUNITY UNDERMINES THE JUDICIARY

The Ninth Circuit further ignored the key policy issue of how the disqualification exception to immunity relates to the legitimacy of the judiciary. This loss of immunity does not threaten judicial independence because Disqualification draws a sharp line of demarcation. So this exception does not create a slippery slope that might undermine immunity in general. Indeed it is just the kind of well-defined and carefully drawn distinction that strengthens and legitimizes the cloak of immunity. We presume that is why the Ninth Circuit in *Gregory* specifically cited disqualification when it discussed the jurisdictional exception to judicial immunity.

The disqualification exception to immunity raises fundamental questions about the role of the judiciary and the very sovereignty of states. Granting review on this

question would remove this cloud of uncertainty that hangs over the immunity foundations of the judiciary.

CONCLUSION

The core question remains: Does a disqualified judge lose immunity from the case from which he has disqualified himself? Is there really a functioning jurisdictional prong in *Mireles*? These are important questions both of jurisprudence and of daily legal practice throughout the judiciary. The Ninth Circuit failed to consistently address them. And no other circuit seems to have specifically addressed them. That itself suggests how widespread the uncertainty must be over these questions. The sheer gravity and textbook specificity of these questions suggest that this court should grant review with summary reversal an appropriate disposition.

Dated: April 14, 2000

Respectfully submitted,
LAW OFICES OF CHEN & HAGGERTY

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Attorney for Petitioner
BART KOSKO, Ph.D.

APPENDIX A

FILED
AUG 13 1999
CATHY A. CATTERSON
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BART KOSKO, Plaintiff-Appellant, v. THOMAS ASHWORTH, III, Judge; JANIS SAMMARTINO, Judge, Defendants-Appellees.	No. 98-57013 D.C. No. CV-98-01606-JTM MEMORANDUM[1]

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Submitted August 10, 1999[2]

Before: BROWNING, SCHROEDER and PREGERSON, Circuit Judges

Bart Kosko appeals the district court's Fed. R. Civ. P. 12(b)(6) dismissal of his civil rights action under 42 U.S.C. §1983 brought against Family Court Judges Ashworth and Sammartino. We affirm.

The district court did not err by concluding that Kosko's Complaint failed to state a claim for relief, because judicial immunity bars his claim that the state judges violated his constitutional rights by conferring with each other to the detriment of his child custody case, as these allegations involve acts committed by the state judges within the scope of their judicial duties and the judges did not act in an absence of authority. *See Stump v. Sparkman*, 435 U.S. 349, 356 (1978). We reject Kosko's assertion that the judges acted in a clear absence of jurisdiction under *Gregory v. Thompson*, 500 F.2d 59, 62 n.2 (9th Cir. 1974). *See Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996).

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Kosko's request for oral argument is denied.

AFFIRMED.[3]

[3] We also reject Kosko's statement that the district judge erred by denying his request to recuse Judge Miller, who had been a state court judge with the defendants. Judge Miller's orders do not show any reliance on extrajudicial knowledge nor display a deep-seated antagonism, and his rulings do not present the rare and extreme circumstances in which a judge may be recused on the basis of his rulings alone. *See Liteky v. United States*, 510 U.S. 540, 556 (1994). Accordingly, the district court did not have to refer the motion to another judge and did not abuse its discretion by denying the motion. *See Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988).

APPENDIX B

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BY: /S DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BART KOSKO, Plaintiff, v. THOMAS ASHWORTH, III, and JANIS SAMMARTINO, Defendant.	CASE NO. 98-1606-JM(POR) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

Defendants Judge Thomas Ashworth, III ("Judge Ashworth") and Judge Janis Sammartino ("Judge Sammartino") moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds of judicial immunity. Plaintiff Bart Kosko, Ph.D ("Plaintiff") opposes the motion. Having carefully

considered the matter presented, the applicable authorities, and for the reasons set forth herein, the court grants Defendants' motion to dismiss with prejudice.

BACKGROUND

On September 3, 1998, Plaintiff, proceeding in pro per, commenced this action alleging that Defendants deprived him of his civil rights in violation of 42 U.S.C. §1983 and obstructed justice in violation of 42 U.S.C. §1985. At the time of the incidents alleged in the complaint, Defendants were judges of the Superior Court of the State of California, Family court Division, in and for the County of San Diego. (Complaint, ¶8).

The grounds for disqualification of Judge Ashworth arise from the following allegations. From 1987 through approximately 1989, Plaintiff alleges that Judge Ashworth was personally and intimately involved with his dissolution and custody dispute. (Comp., ¶12). Judge Ashworth, a former law partner with Plaintiff's counsel in the dissolution proceeding, was continually apprised of the developments in Plaintiff's dissolution proceeding. Plaintiff further alleges that Judge Ashworth's son performed majority of the work on Plaintiff's dissolution proceeding.

On August 7, 1997, Judge Sammartino entered an order awarding child custody to Plaintiff rather than to his former wife who was then living in Tijuana, Mexico. (Comp., ¶¶18, 20). On August 4, 1997, Plaintiff's attorney, James P. Dunne, went before Judge Ashworth for an ex parte child custody hearing. Plaintiff's attorney was not then aware of Judge Ashworth's

alleged conflict of interest arising from Plaintiff's earlier dissolution proceeding. At that hearing, Judge Ashworth ruled against Plaintiff. On August 15, 1997, Judge Ashworth, learning of the potential conflict, vacated his earlier order and recused himself. (Comp. ¶19). The award of child custody to Plaintiff was confirmed by Judges Domnitz and Kutzer and, on September 2, 1997, the child custody order was upheld by Judge Sammartino. (Comp., ¶¶20, 21).

Between September 2, 1997 and September 5, 1997, Plaintiff alleges that Judge Ashworth conferred with Judge Sammartino and convinced her to abandon her impartiality and modify the child custody award to favor the mother. (Comp. 22). In furtherance of the alleged conspiracy to obstruct justice, on September 5, 1997, Judge Sammartino reversed her prior custody order and awarded custody of the child to the mother in Tijuana. (Comp., ¶27). Shortly thereafter, in an in-chambers conference with Defendant, Judge Sammartino admitted that she discussed the case with Judge Ashworth. Judge Sammartino then vacated the September 5, 1997, order and recused herself from the case. (Comp., ¶28).

DISCUSSION

Legal Standards

Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal

theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should not dismiss a complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle [the party] to relief." Moore v. City of Costs Mesa, 886 F.2d 260, 262 (9th Cir. 1989) (quoting Conley V. Gibson, 355 U.S. 41, 45-46 (1957)), cert denied, 496 U.S. 906 (1990). The defect must appear on the face of the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy. Levine v. Diamanthuset Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however, consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922,926 (9th Cir. 1996).

Judicial Immunity

The doctrine of judicial immunity is particularly broad. "Judges are immune from damage actions for judicial acts taken within the jurisdiction of their

courts." Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986); Mireles v. Waco, 502 U.S. 9 (1991).

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.

Stump v. Spademan, 435 U.S. 349, 356-57 (1978) (citations omitted). Stated another way, the doctrine insulates judges from civil liability "for acts committed within their judicial jurisdiction," or "for acts within [their] judicial role," Pierson v. Rev. 386 U.S. 547, 554 (1967), or "for their judicial acts." Bradley v. Fisher, 80 U.S. (Wall.) 335, 351 (1871). Judicial immunity is overcome in only two narrow sets of circumstances.

> First, a judge is not immune from liability for non-judicial actions, i.e., actions not taken in the judge's judicial capacity. Second a judge is not immune for action, though judicial in nature, taken in the complete absence of all jurisdiction.

Mireler, 502 U.S. at 11-12. Because the compliant challenges several acts allegedly carried out without jurisdiction, the court addresses each event in turn.

In the first cause of action, Plaintiff alleges that on August 14, 1997, Judge Ashworth knowingly acted without jurisdiction in issuing an order modifying the

(sic) Judge Sammartino's order of August 7, 1997. As a judge with jurisdiction over family law and/or juvenile law matters, and performing the judicial act of modifying a custody order, there is no room for the argument that Judge Ashworth acted in the clear absence of all jurisdiction. He clearly had jurisdiction and his order was a judicial act. This is true even if Judge Ashworth were aware that there was a conflict of interest due to a former law partner's representation of Plaintiff in his dissolution proceeding ten years earlier. To make matters clearer, even if Judge Ashworth acted in bad faith and with malicious intent to cause Plaintiff harm by issuing his ruling,[1] "[a]s long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986); Pierson, 386 U.S. at 554 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"). Judge Ashworth is therefor absolutely immune from any cause of action related to the issuance of his August 14, 1997 order.

The second event triggering Plaintiff's deprivation of constitutional rights claim occurred after Judge Ashworth's prompt recusal on August 15, 1997. Plaintiff alleges that

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[1] The court observes that there is no factual basis for this allegation. Indeed, once Judge Ashworth was informed of the relationship with his ex-law partner, Judge Ashworth promptly vacated his order and disqualified himself. (Comp., ¶19).

> Defendant Ashworth conferred with Defendant Sammartino sometime between the hearing of September 2, 1997 (wherein Judge Sammartino affirmed her earlier child custody order) and September 5, 1997 (wherein Judge Sammartino reversed her earlier child custody order) wherein Defendant Ashworth induced Defendant Sammartino to abandon her impartiality and change the prior orders in violation of Plaintiff's constitutional right to due process under the Constitution of the United States, Fifth and Fourteenth Amendments 18 U.S.C. §1503 and 42 U.S.C. §1983.

(Compl., ¶22). Plaintiff contends that Judge Ashworth's discussion with Judge Ashworth was an act in the "clear absence of jurisdiction." In constructing his argument, Plaintiff relies on dicta set forth in Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). In discussing general immunity principles, the Ninth Circuit indicated in a footnote.

> Examples of acts 'in the clear absence' of jurisdiction include a judge's interference with judicial proceedings after he had disqualified himself from acting therein, see Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963), cert. denied, 379 U.S. 938 (1964).

Id. At 62 n.2. Thus, because Judge Ashworth interfered in his child custody dispute after he disqualified himself, Plaintiff concludes that judicial immunity does not apply. This argument misconstrues the nature of judicial immunity.

The relevant inquiry before this court is the nature and function of the act, rather than the act itself. Mireles, 502 U.S. at 13. "In other words, we look to the particular act's relation to a general function normally performed by a judge." Id. Here, the act of judges conferring and discussing points of law, particular facts, or exchanging other communications is an inherent judicial function and one that is specifically provided for in the Code of Judicial Ethics. California Code of Judicial Ethics Canon 3(B)(7)(b) (1996) ("A judge may consult ... with other judges" outside the presence of the parties). Because such judicial acts often go to the core of the proper administration of justice and are intimately involved with the judicial deliberative process, judicial immunity applies to protect this function. The court's focus is not on Plaintiff's allegations of a conspiracy to deprive him of constitutional rights, but on the nature of the judicial function at issue. Finally, the policies underlying the doctrine of judicial immunity – to ensure independent and disinterested judicial decision making – are furthered by granting complete judicial immunity in the present action. As such, while the alleged conduct may be improper, it does not pierce the immunity extended to judges.[2]

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[2] Like other forms of absolute immunity, "judicial Immunity is an immunity from suit, not just from ultimate assessment of damages." Mireles, 502 U.S. at 11. Sec also Imbler v. Pachtman, 424 U.S. 409, 424-29

The final event subject to challenge concerns Judge Sammartino's order on September 5, 1997, wherein she reversed he earlier child custody order. Clearly, for the above stated reasons, Judge Sammartino properly exercised jurisdiction and is afforded judicial immunity for her acts.

Having carefully considered the matter presented, the court grants Defendants' motion to dismiss. Because it appears to a certainty that there are no circumstances under which Plaintiff is able to allege that Defendants acted in the "clear absence of jurisdiction" or acted outside their judicial role, the motion to dismiss is granted with prejudice. See Moore, 886 F.2d at 262.

IT IS SO ORDERED.

DATED: 11-6-1998

/S/
JEFFREY T. MILLER
United States District Judge

cc: All parties

(1975). To permit a suit to proceed, based upon easy to make but difficult to prove conspiracy allegations, could weaken the ultimate fairness of the judicial system itself. Id. By analogy to Imbler, absolute immunity avoids the chilling effect that would result if judges were not free to discuss amongst themselves, in private and without fear of lawsuits, any issue even remotely related to a particular action before the court. Any other holding would serve to hinder the judicial process.

APPENDIX C

FILED
JAN 18 2000
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BART KOSKO, Plaintiff-Appellant, v. THOMAS ASHWORTH, III, Judge; JANIS SAMMARTINO, Judge, Defendants-Appellees.	No. 98-57013 D.C. No. CV-98-01606-JTM Southern District of California ORDER

Before: BROWNING, SCHROEDER and PREGERSON, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

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The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

State of California
Commission on Judicial Performance
101 Howard Street, Suite 300
San Francisco, CA 94105
(415) 904-3650
FAX (415) 904-3666

June 17, 1998

Bark Kosko, Ph.D.
Department of Electrical Engineering
University of Southern California
Los Angeles, CA 90089

Dear Mr. Kosko:

I am writing to inform you about commission action following your letter of complaint dated November 7, 1997. The commission has considered the matter and taken an appropriate corrective action. Please be advised that this is the extent of the notice and disclosure allowed by Commission Rule 102(e).

The commission has asked me to express its appreciation for your advising us about this matter. Bringing this matter to our attention has served a useful purpose. Thank you for taking the time to write.

Very truly yours,
/s
Cynthia Dorfman
Staff Counsel

CD:ej/10617kos

Confidential under California Constitution,
Article VI, Section 18, and Commission Rule 102